
BRIDGING TRADITION, MODERNITY AND LAW: LEGALIZING PRENUPTIAL AGREEMENTS IN INDIA

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ABSTRACT

Prenuptial agreements are widely being used across different regions in the world and now even in Indian metropolitan cities but there is no legal validity of such agreements, and they largely depend upon the discretion of courts in this regard which refers to personal laws creating a wide confusion regarding the legal validity of prenuptial agreements in India.

This paper firstly understands and explains what prenuptial agreements are and how they are being used in today's India. then exploring relevant case laws and precedents as given by different high courts as well as the supreme court of India. Then, analysing different countries which have legalised prenuptial agreements and providing a model legal framework under the Special Marriage Act, 1954, for the legalisation of such agreements or contracts.

Keywords: Prenuptial Agreements, Marriage, Divorce, Maintenance, Alimony, etc.

I. Introduction

Even though India has one of the lowest divorce rates in the world approximately 1.1%¹ in contrast to the United States of America's staggering 39%², need for legalization of prenuptial agreements is of paramount importance given the current scenario in the Indian subcontinent, where marriage by young generation is seen more of contractual nature than sacramental nature which can be evidently seen by the increasing divorce rates and subsequent popularity of prenups in the country. In metropolitan cities such as Mumbai and Delhi, it is estimated that nearly 20% of marriages involve such agreements.³ However, it can be indisputably argued that prenups are gaining popularity among the metro cities but not in semi-rural and rural India as marriage is still seen as a sacrament but not a contract in these parts of the country.

A prenuptial agreement, commonly known as a prenup, is a legally binding contract entered into by a couple before marriage. This agreement primarily outlines financial, and property related terms that will apply in the event of divorce, separation, or death. The main purpose of a prenup is to protect the individual rights and assets of each spouse while also specifying how their financial matters will be handled during and after marriage.⁴ A prenuptial agreement is a formal contract between two individuals intending to marry, outlining the terms and conditions related to asset ownership, management of future earnings, control over individual property, and the probable disunion of assets in the occurrence of a divorce.⁵ A prenup can serve as a practical tool for avoiding litigation and disputes regarding property division, inheritance, alimony, and maintenance. It can also provide clarity on financial responsibilities, which can be especially beneficial in marriages involving significant assets or business interests.⁶

This paper Examines the validity and enforceability of prenuptial agreements under the Indian contract Act, 1872, different personal laws such as Hindu Marriage act, 1955 and Muslim

¹ Deccan Herald, 'Pitfalls of Divorce Proceedings in India: Perfect Statistics and the Noisy Current of the Ganges' 2021, <https://www.deccanherald.com/brandspot/pr-spot/pitfalls-of-divorceproceedings-in-india-perfect-statistics-and-the-noisy-current-of-the-ganges-990273.html> Accessed 20th June 2025.

² National Centre for Health Statistics, 'Marriage and Divorce Data,' (Centres for Disease Control and Prevention, 2021), <https://www.cdc.gov/nchs/nvss/marriage-divorce.htm> Accessed 20th June 2025.

³ Arunima Jha, 'Pre-Nuptial Agreement: A Death Knell for Marriage,' A.P. legal services Pvt. Ltd., Goforthelaw.com | Legal Education and Awareness | Articles | Moot Court help | Directories | Law Web Journal | upcoming Major Central Acts... Accessed 20th June 2025.

⁴ Manupatra, 'The Emergence of Prenuptial Agreements in India's Legal Framework,' From Taboo to Trend: The Emergence of Prenuptial Agreements in India's Legal Framework. Accessed 20th June 2025.

⁵ Prenuptial agreement, The Britannica Dictionary.

⁶ King Stubb & Kasiva, 'Pre-Nuptial Agreements: Legal Validity in India,' Pre-CoC Application for CIRP Withdrawal Valid, Rules Supreme Court Accessed 20th June 2025.

personal laws also analysing the status of prenups in other communities in India. Analysis of section 40 of Divorce Act and if prenups can be valid under this section. Evaluating different precedents given by respective high courts and supreme courts in different cases. Then we will examine some potential drawbacks of legalization of prenups in India and how can they be addressed in the process. Furthermore, this paper reviews Models adopted by different countries around the world in legalization of prenuptial agreements and giving a potential model for India by which we can also legalize prenuptial agreements in India.

I. Hindu Marriages and prenuptial Agreements

Even though the concept like divorce finds its traces in Manusmriti which is an ancient Indian text, the statute and the courts recognize marriages under Hindu marriage act, 1955 as a sacrament which is a bond on a spiritual level. Hindu marriage is considered a sacrament and is viewed as a union that is only deemed complete after all the rituals and ceremonies are performed (Homa and Saptapadi are essential rites).⁷ the purpose of Hindu marriage extends beyond just having children and includes the completion of various religious rites and duties. According to Hindu beliefs, the husband and wife are believed to be joined together at a spiritual level, and the wife is referred to as "ardhangini" or "sahadharmini," which means "half of the husband", marriage is an indissoluble union of flesh and blood which persists even after death.⁸

The courts in different cases have held that prenuptial agreements are violative of public policy and hence is an invalid contract under the Indian Contract Act, 1872 Section 23 which clearly states that if the any contract defeats the purpose of any law or the courts regard it as immoral or opposed to public policy the consideration and object of that particular contract will be deemed unlawful and as the Vedas describe marriage as not only a contractual bond but “a union of flesh and blood” on which a religious practice of taking seven steps around the holy fire is based which is a mandatory practice under section 7 of the Hindu marriage Act, 1955 court in different cases have invalidated prenuptial agreements. But in some exceptional cases it has even validated some of these agreements.

⁷ Priya Bala Ghosh v. Suresh Chandra Ghosh (1971) SC 1153.

⁸ Tekait Mon Mohini Jemadai vs Basanta Kumar Singh (1901) ILR 28 Cal 751.

As section 23 of the Indian contract act, 1872 States that any agreement is void if the court finds it to be immoral or opposing to public policy. A similar stance has been seen in the case of Tekait Mon Mohini Jemadai v. Basanta Kumar Singh⁹ where the court had stated that any agreements that provide for the future separation of the wedlock are contrary to public policy. In this case the Court observed that if any right of either of the spouse is being curtailed by a marital agreement or prenuptial agreement, it is void under section 23 of the Indian Contract Act, 1872. It is one of the landmark cases where the court expressly indicated that marriage under the Hindu law is a sacrament and that any agreement that provide for future separation or curtails any right of either of the spouse in marriage is contrary to public policy and is hence, Invalid.

In the case of Krishna Aiyar v. Balammal¹⁰ an agreement was entered by a couple when they were already separated on the assurance that the couple will stay together and in case of then any future separation alimony would be provided by the husband. But in this case the couple did not stay together as assured when the contract was drafted. Hence, in this case the Madras high court invalidated the agreement stating that it was against the marital obligation under Hindu law. The court also mentioned that the contract envisaged future separation and was hence contrary to public policy.

Another case where prenuptial agreements were outlined by the court was Paigi v. Sheonarain¹¹ where the husband and wife entered a contract where husband was compelled to live in his in-law's household. Later, when a dispute arose which resulted in husband leaving the house and consequently filling a petition to reclaim his conjugal rights. The court upheld the precedent given by the Calcutta high court in the Mon Mohini case and held that the contract is void as it is against the public policy.

In the case of A.E. Thirumal Naidu v. Rajammal¹² in this case the core legal issue which come before the Madras high court was whether a marital agreement which the couple entered before marriage to live apart conflicts with the wife's conjugal rights. In this case the court held that a prenup to live separately in future will also be considered against the public policy. The court

⁹ Tekait Mon Mohini Jemadai vs Basanta Kumar Singh (1901) ILR 28 Cal 751.

¹⁰ Krishna Aiyar v. Balammal (1911) ILR 34 Mad 398

¹¹ Paigi v. Sheonarain (1885) SCC Online All 24; ILR (1886) 8 All 78.

¹² A.E. Thirumal Naidu v. Rajammal (1967) SCC Online Mad 3; (1967) 2 Mad LJ 484

observed that any agreement which controls the rights of the parties concerned which the law entitles them to after marriage will make the nature of the marriage infructuous.

A similar stance was taken by the Orrisa high court in the case of *Sirbataha Barik v. Musamat Padma*¹³, ruling that any agreement which mandates a future separation or separate residence post-marriage violates Hindu law and in such cases the contract shall be held void. The courts have maintained quite similar instances regarding prenuptial agreement but in some cases the courts have also upheld the validity of prenuptial agreements in India. Departing from earlier precedents, courts in cases such as *Sandhya Chatterjee v. Salil Chatterjee*¹⁴, *CIT v. Mansukh Rai More*¹⁵, and *Sunita Devendra v. Sitadevi Desh prabhu*¹⁶ have upheld the validity of marital agreements.

The Bombay high court in the case of *Bai Appibai v. Khimji Cooverji*¹⁷ held that marriage can act as valid consideration for the agreement and that a prenuptial agreement is legal and enforceable if it is followed by marriage. The court in this case concluded that if there is no question regarding her chastity then she is entitled to separate maintenance and residence under the terms of prenuptial agreement. The court clarified that even if the husband is considered a deity in Hinduism, it does not allow the husband to defer from his marital duties. Hence, we can conclude that the principles established by the court in *Mon Mohini* case will not apply in cases where the husband has abandoned his wife.

In another case namely *Pran Mohan Das v. Hari Mohan Das*¹⁸ a man entered a marriage on assurance from his father-in-law to transfer possession of the property through an unregistered gift deed to his daughter i.e. his prospective wife. The couple acquired the house for several years before deciding to sell it to a third party. The father-in-law as a result filed a lawsuit against the couple. The court held this as a valid contract invoking the doctrine of part performance of a contract. Furthermore, the court held that the agreement did not invoke a marriage brokerage contract and was not against the public policy. Even though it was a case where there was a contract not between the couple but the in-laws and the husband it is

¹³ *Sirbataha Barik v. Musamat Padma*, AIR 1968 Ori 110.

¹⁴ *Sandhya Chatterjee v. Salil Chandra Chatterjee*, 1980 SCC Online Cal 67: AIR 1980 Cal 244.

¹⁵ *CIT v. Mansukh Rai More*, 1988 SCC Online Cal 339: (1988) 174 ITR 703: (1989) 75 CTR 101.

¹⁶ *Sunita Devendra Deshprabhu v. Sitadevi Deshprabhu*, 2016 SCC Online Bom 9296: (2016) 6 Bom CR 567.

¹⁷ *Appibai v. Khimji Cooverji*, 1934 SCC Online Bom 62: AIR 1936 Bom 138.

¹⁸ *Pran Mohan Das v. Hari Mohan Das*, 1924 SCC Online Cal 94: AIR 1925 Cal 856

considered one of the landmark cases which validated marital agreements in India.

In a landmark case the Allahabad high court held that even though marriage is regarded as a sacred institution under the Hindu law it also embodies a civil contract between the two parties. The court acknowledged Despite the fact that marriage is considered sacramental in Hindu law, it also possesses contractual elements. Hence, the case of Bhagwati Saran Singh v. Parmeshwari Nandar Singh¹⁹ acknowledged prenuptial agreements as legally enforceable contracts under the Indian legal framework. This ruling opened the possibility of recognition of prenups under the Hindu law when the terms and conditions of the agreement are not in direct contradiction with the Hindu marriage principle.

In Sunita Devendra Deshpabhu v. Sitadevi Deshpabhu²⁰ a prenuptial agreement dated 7th May, 1955 was voluntarily executed. This agreement was majorly concerned with the division of property in case of separation. Even though court's decision in this case relied upon the contractual terms of the said contract in dividing the properties of the couple, it did not validate prenuptial agreements itself. Even though it did not validate prenuptial agreements but still played a pivotal role.

Another landmark case namely Sandhya Chatterjee v. Salil Chatterjee²¹ an agreement took place between the couple that the husband would provide maintenance to his wife, daughter and son in consideration for the withdrawal of all the charges put up on the husband in matrimonial court. Later, when all these charges were withdrawn the husband refused to pay any such maintenance. Consequently, a suit was filed by the wife against the husband for non-compliance with the recent agreement. The court in this case held that husband and wife can compromise on legal proceedings and can make a contract for separation and that the contract is legally valid and enforceable.

Further, in CIT v. Mansukhrai More²² the High Court of Calcutta held that the transfer of property as per prenuptial agreement for the accomplishment of commitments undertaken was justified and shall not attract section 16(3) of the Indian Income Tax Act, 1922. Another important precedent was given in the case of Printing and Numerical Registering Co. v.

¹⁹ Bhagwati Saran Singh v. Parmeshwari Nandar Singh AIR 1959 SC 906

²⁰ Sunita Devendra Deshpabhu v. Sitadevi Deshpabhu, 2016 SCC Online Bom 9296: (2016) 6 Bom CR 567.

²¹ Sandhya Chatterjee v. Salil Chandra Chatterjee, 1980 SCC Online Cal 67: AIR 1980 Cal 244.

²² CIT v. Mansukhrai More, 1988 SCC Online Cal 339: (1988) 174 ITR 703: (1989) 75 CTR 101.

Sampson²³ where the court set through some guidelines in declaring a contract void on the grounds given in section 23 of the Indian Contract Act, 1872. The court said that the court shall consider the paramount public policy concern in terms of respecting free and voluntary contract between two adult persons. Thus, it can be said to be observed by the court that wife's demand for separate maintenance is justified when living independently and is not against public policy.

Hence, it is evident from the cases mentioned above that the courts have started to change their decisions in favour of prenuptial agreements. But in most of these cases courts have acted according to the situations/fact of the respective case but not just the law. As it can be evidently observed in the case of *Sandhya Chatterjee* where any agreement in restraint of legal proceedings is void, the court has validated it. Hence, it can be evidently observed that in cases involving matrimony the court not only investigate the facts of the case and laws concerned but quite equally takes into consideration the sentimental value of both the parties to the case.

However, in other cases the courts have followed the law as well as have considered the facts of the case while delivering their judgement. The courts have not directly validated prenuptial agreements but have done it in 2 ways under the Hindu law. One is by delivering their judgement on the agreements done before the marriage by the couples which is also mentioned in section 40 of the divorce act. The other way is by providing exceptions to the larger legal framework in this regard.

II. Prenuptial Agreements under Muslim Personal Laws

As seen above in multiple cases that institution of marriage is seen not on a contractual basis but on a sacramental and spiritual level. However, in Muslim personal laws marriage is seen not as a sacrament but rather as a civil contract. In 2 landmark judgements namely *Abdul Kadir v. Saliman and Others*²⁴ and *Yusuf v. Sowaramma*²⁵ the supreme court has held that marriages under Muslim law is a civil contract rather than a sacrament. Despite that courts on several instances have held prenuptial agreements void on the grounds of public policy. However, these agreements are allowed by the personal laws commonly referred to as *Nikah-Nama*. It is an agreement signed by the couple during their wedding ceremony which outline the rights, obligations, and responsibilities of the parties involved, including the witnesses present at the

²³ *Printing and Numerical Registering Co. v. Sampson*, (1875) 19 Eq 462.

²⁴ *Abdul Kadir v. Saliman and Others* (1886) I.L.R 8 All 149

²⁵ *Yusuf v. Sowaramma* 1971 S.C.

event. This document must be publicly declared and cannot remain confidential. Even though this document cannot be said to be a marital document which provides for future separation.

The Bombay high court in the case of *Bai Fatma v. Alimahomed Aiyeb*²⁶ held that any agreement which provides for maintenance of wife in case of separation is void on the grounds of public policy as it encourages a future separation out of the wedlock for couples under Mahommedan law. It was observed by the court in this case that agreements which stipulates a specific maintenance amount for wife by its nature promote possibility of future separation. Hence, if the language of any agreement made prior to marriage anticipates a future separation it shall be held void. Further, in the case of *Khatun Bibi v. Rajjab*²⁷ the court observed that a prenuptial condition where the husband is compelled to live permanently in his In-laws house violates the principles of Mahommedan law and hence, any such contract is void.

In another landmark case, *Ahmad Kasim Molla v. Khatun Bibi*²⁸ the couple entered a contract which clearly stated that in case of ill treatment of wife, she can leave the husband, and the husband shall be paying her a substantive amount and monthly rent each month. The wife left the husband and a talaknama was sent by the husband to the wife which was not received by the wife. In this case Calcutta high court held that the wife is had the right to maintenance for the iddat period. Further, the court observed that as the prenuptial agreement did not mention period for substantive allowance, divorce and the parties were mentioned as bride and bridegroom. Hence, the husband is only liable to pay the maintenance amount for the iddat period. This was a case where the verdict contained bad law as the court was just concerned with the law but not the ethical, moral and sentimental value attached to the facts of the given case. These were some instances where courts have invalidated prenups under the Muslim personal laws on a similar ground as to Hindu marriages.

In the case of *Buffatan Bibi v. Sk. Abdul Salim*²⁹ the court held that a kabinnama i.e. prenuptial agreement are enforceable in the court of law. In this case the husband files a suit for restitution of conjugal rights but the wife taking the defence of a prenup stated that she has the right to divorce herself and no longer consider herself his wife. Court upon examine the contract finds

²⁶ *Bai Fatma v. Alimahomed Aiyeb*, ILR (1913) 37 Bom 280.

²⁷ *Khatun Bibi v. Rajjab*, AIR 1926 All 615

²⁸ *Ahmad Kasim Molla v. Khatun Bibi*, 1931 SCC Online Cal 278; AIR 1933 Cal 27

²⁹ *Buffatan Bibi v. Sk. Abdul Salim*, 1950 SCC Online Cal 28; AIR 1950 Cal 304.

it executable in the court of law.

In the case of Mohammed Khan v. Mst. Shamali³⁰ the parties entered a contract that post-marriage the husband shall reside at wife's father's house and in case of non-compliance with the agreement the prospective husband shall be liable to bear the hefty expenses associated with the wedding. Post marriage the husband left the house for four years and failed to fulfil marital obligations. The High Court of Jammu and Kashmir upheld the validity of this contract ruling that such type of contracts are not violative of either public policy or Muslim law as it is a common practice in J&K.

In the case of Muhammad Muin-Ud-Din v. Musammat Jamal Fatima³¹ a prenuptial agreement was formed between the husband, wife and the father-in-law which expressly stated that in any future conflict or separation the husband will be liable to pay the maintenance as the prospective husband in past had mistreated her previous wives. The court in this case validated the prenuptial agreement and held that it is not against public policy under section 23 of the Indian Contract Act, 1872.

In Saifuddin Sekh v. Soneka Bibi³² the couple entered into a prenuptial agreement that the husband who already had two previous wives if brings any of his former wives to stay with him without the third wife's consent, the third wife or the plaintiff can file for a divorce on her own by the virtue of the delegation through her agreement. Thus, when the plaintiff filed for a divorce with the terms of the agreement the husband filed for restitution of conjugal rights. The court held that it is a valid prenuptial agreement and that the wife can file for divorce according to the terms of the agreement.

It can be evidently observed through the cases mentioned above that even though Mahommedan law provides for prenuptial agreements courts have unvalidated some of them on the grounds of public policy under section 23 of the Indian Contract Act, 1872. But in most of the cases unlike Hindu law courts have upheld the validity of prenuptial agreements in Muslim law. It can also be observed in the case of Mohammed Khan v. Mst. Shamali that matrimonial issues are dealt differently in different cultures as the practice of Khana Damad is

³⁰ Mohammed Khan v. Mst. Shamali AIR 1970 J&K 27.

³¹ Muhammad Muin-Ud-Din v. Musammat Jamal Fatima MANU/UP/0072/1921

³² Saifuddin Sekh v. Soneka Bibi MANU/GH/0054/1954

a common cultural practice in Kashmir valley. Hence, the court held it as valid agreement whereas in similar other cases the courts have invalidated such agreements.

III. Prenuptial Agreements and Other Communities in India

The Indian Christian Marriage Act, 1872 regulates Christian marriages in India and dissolution of these marriages are regulated by The Divorce Act, 1869. Despite the fact that prenuptial agreements are not directly mentioned in the act but section 40 of The Divorce Act, 1869 requires the court to investigate any prenuptial or post-nuptial agreements that exists between the couple and shall issue an order regarding the distribution of property based on the terms of such agreement while granting a decree for the dissolution of marriage. The court in such cases shall not pass a verdict for the benefit of the parents at the expense of children. Hence, while this section gives a more specific idea and make prenuptial agreements enforceable for one community but in other personal laws in India there is no such specification for prenuptial agreements.

In respect to marriage laws of Hebrew and Jews, one of the earliest forms of a prenuptial agreement is found in Hebrew marriages. A prenuptial agreement known as 'Ketubah' is a form of prenuptial agreement which was executed before marriage with the primary purpose of ensuring a women security in case of widowhood or divorce. A resembling concept exists in the Jewish practice of Ketubah marriage which resembles to modern prenuptial agreements. The ketubah outlines primary rights and obligation of the husband as well as the wife. It includes provisions for maintenance of wife in the event of divorce or death of the husband.

The court in the case of *Mozelle Solomon v. R.J. Solomon*³³ held that Jewish marriages are a mere contract but not a religious sacrament which makes them like Muslim marriage as they both see marriage as a civil contract but not a religious sacrament, they shall align with modern public policy standards. Marriages can also be registered under Special Marriage Act, 1954. In such cases, proper registration and submission of necessary documents at the registrar's office are required for the agreements to be legally enforceable.

³³ *Mozelle Robin Solomon v. R.J. Solomon*, 1968 SCC Online Bom 120: (1979) 81 Bom LR 578.

IV. Prenuptial agreements in Goa

Prenuptial agreements hold legal validity in Goa under the Portuguese Civil Code, 1867 this signifies that personal laws does not have any influence there.³⁴ A prenuptial agreement with the purpose of property distribution is legally enforceable in Goa under Article 1096 of the Portuguese Civil Code, 1867 and if no such agreement is made it is presumed that they have married under communication of assets. Communication of property entitles and safeguards wife's right to receive equal share in the property bought into the marriage by both the couples.³⁵

The civil code of Goa has been appreciated by the apex court in the case of Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve³⁶ where it was said that "The Code has, thus, proved to be a powerful weapon to create and forge a cohesive, well-knitted and homogeneous society with its citizens living in peace and harmony, as well as to strengthen that basic unit of the society - the family - by safe- guarding the interests of the children and of the widows." The current legal system for Goa demonstrates that a legal reform is possible in rest of the country.

V. Prenuptial Agreements: Around the Globe

Prenuptial agreements were not enforceable under English law as they considered it against public policy same as India. In *Westmeath v. Westmeath*³⁷, the Court ruled that any contract or agreement that financially incentivizes one party to dissolve the marriage is against public policy and detrimental to the sanctity of the marital institution. Another case named namely *Hyman v. Hyman*³⁸, the house of lords held that completely oust the jurisdiction of the court to provide financial remedies to any party shall be deemed void.

However, in a landmark case namely *Radmacher v. Granatino*³⁹ in which the supreme court of U.K. recognized prenuptial agreements enforceable under English law. The Court outlined three key conditions for such agreements to be valid: (1) the agreement must be entered into

³⁴ Jose Paulo Coutinho v. Maria Luiza Valentina Pereira, 2019 SCC Online SC 1190

³⁵ Amrita Ghosh & Pratyusha Kar, Pre-nuptial Agreement in India: An analysis of law and society 2019, NUJS Law Review.

³⁶ Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve MANU/MH/0535/1996

³⁷ *Westmeath v. Westmeath*, 6 E. R 619, (1830)

³⁸ *Hyman v. Hyman* (1929) AC 601.

³⁹ *Radmacher v. Granatino*, U.K.S. C 42, (2010)

voluntarily and without coercion. (2) both parties are required to fully disclose their financial circumstances and (3) the terms of the agreement must not be unfair or inequitable.

However, this progressive step appeared to take a step back in 2008 when in the case of *MacLeod v. MacLeod* where the Privy Council opined that objections rooted in public policy did not affect the enforceability of postnuptial agreements, thereby affirming their validity and that the Council simultaneously maintained that prenuptial agreements would continue to face such objections under public policy.

The law commission of England in February 2014 released a report⁴⁰ under which they recommended some guidelines to ensure that prenups could be legally enforceable in England. This report proposed several procedures with the intention of improving the drafting and enforcement of marital contracts. Following shall be satisfied before an agreement is considered binding: (1) both parties must have provided material disclosure of their assets, signed the agreement at least 28 days before the wedding (2) obtained legal advice, they have been informed that their prenup will prevent financial provision different to that specified in the agreement (unless needs are not provided for) (3) they are aware of the effect their agreement will have on divorce.

France identifies prenuptial agreements as part of its vow to the Hague Convention on the Law Applicable to Matrimonial Property. This convention's article 12⁴¹ clearly states that a marriage contract or a prenuptial agreement is valid as to form if it complies either with the Internal law applicable to the matrimonial property regime, or with the Internal law of the place where it was made. In any event, the marriage contract shall be in writing, dated and signed by both spouses. Article 1387 of French Civil Code sets forth its own rules regarding these agreements.

In French law, spouses have the option to sign a marriage contract either before or during their marriage. Both parties must appear before a public authority before marriage to determine the applicable legal framework for their union. These contracts outline how the couple's assets, both those acquired before and during the marriage, will be treated. Typically, marriage contracts are drafted and signed in the presence of a notary, a legal professional specializing in patrimonial matters who serves as a neutral public officer. It's important to note that prenuptial

⁴⁰ Law Commission (United Kingdom), *Matrimonial Property Agreements*, Consultation Paper No. 343, (2014)

⁴¹ The Hague Convention on the Law Applicable to Matrimonial Property Regimes'1978, Art 12

agreements under French law primarily address the division of assets and does not include provisions regarding maintenance payments in the event of divorce or separation.

In 2001, the Chinese government acknowledged the legal enforceability of prenuptial agreements. Article 19 of the Marriage law of the Peoples Republic of China⁴² mandates that any such agreement shall be documented in writing and shall clearly outline the mutual consent of the spouses. The Article further states that the couple may agree that the property acquired during the marriage or before the marriage, can be held separately, jointly or partially separate or partially joint. The agreement shall specify if the properties will be acquired individually or jointly during the marriage and address the ownership of assets acquired before the marriage whether retained individually or shared, based on the spouses' consensus.

The Hong Kong High Court, in *SHP v. SAI*⁴³, ruled that prenuptial agreements should be recognized as binding in Hong Kong as well. The supreme court of China has held that a house bought before marriage remains the personal property of the owner after divorce. However, if mortgage payments were made during the marriage by the non-owner spouse, the owner must reimburse those contributions.⁴⁴

In the United States of America prenuptial agreements are legally enforceable across all fifty states but with their own procedural requirements. U.S.A enacted "Uniform Premarital Agreement Act" in 1983 making prenuptial agreements legally enforceable. 27 states adopted the legislation, and the remaining 23 states enacted their own specific rules for prenuptial agreements but aspects like the agreement shall be in writing and shall be drawn before marriage is common throughout. If an agreement is deemed to be inequitable or in violation of public policy, it can be rendered void. The primary intent of these legal provisions is to protect the more vulnerable party and ensure fair division of assets between the spouses.⁴⁵

In *re Marriage of Bonds* case⁴⁶, the California Supreme Court established certain guidelines in the case of Prenuptial agreements by necessitating the following conditions: (1) That both the

⁴² Marriage Law of the People's Republic of China, (2001), Art. 19 (China)

⁴³ *SPH v. SA*, (2014) F.A.C.V 22/2013

⁴⁴ Supreme People's Court, Interpretation (III) of the Supreme People's Court of Several Issues on the Application of the Marriage Law of the People's Republic of China, August 2011; Qiao Hong, New Interpretation of Chinese Marriage Law sparks loud debate, 17(6) CONFUCIUS INSTITUTE MAGAZINE (2011), available at <http://confuciusmag.com/new-chinese-marriage-law-sparks-loud-debate>

⁴⁵ Amrita Ghosh & Pratyusha Kar, Pre-nuptial Agreement in India: An analysis of law and society 2019, NUJS Law Review.

⁴⁶ *re Marriage of Bonds* case, 71 Cal.App.4th 290.

spouses should be represented by their independent attorneys. (2) A prenuptial agreement can only be finalized seven days after the time when they were first presented with it. (3) If a spouse waives off their right to independent counsel, they shall provide a written statement intimating the same to the concerned court.

In another case of *Dejesus v. Dejesus*⁴⁷ the New York court of appeal held that provisions in a prenuptial agreement that attempted to waive or limit child support were unenforceable as against public policy. The court emphasized that child support is a legal right of the child and that public policy requires the court to ensure that children are adequately supported by their parents. The court opined that parties cannot contract away or reduce child support obligations through prenuptial agreements, as it is the court's responsibility to determine child support based on the child's best interests and the financial circumstances of the parents at the time of divorce or separation.

VI. The Special Marriage Act, 1954: An Additional Section

The Special Marriage Act, 1954 is a secular act enacted by the parliament to provide a legal framework for inter-religious marriages. This act gives an alternative to personal laws in India for the purpose of providing legal recognition to marriages. This act is applicable to whole of the India and provides a legal framework of marriages, regardless of their religion and faith. There are several given procedures in the said act for solemnization of marriage irrespective of caste, creed, religion or place of birth. The provision of this act also provides for divorce, maintenance and judicial separation in cases involving cruelty, insanity, desertion or irretrievable breakdown of marriages. As it is a secular act adding a provision for people who want to enter into prenuptial agreements will not be in violation with any public policy or sacramental nature of marriages.

This section shall be added to chapter VIII of the said act which shall govern the provisions regarding drafting, notarization, validity, disputes, etc in case of such agreements. These types of agreements can be used to the disadvantages of either gender hence, the courts with common law practice shall develop procedural safeguards in such cases. As held in the case of *Gherulal Parakh vs Mahadeodas Maiya and Others*⁴⁸, “If it is said that the rules have to be moulded to

⁴⁷ *Dejesus vs Dejesus*, 90 N.Y.2d 643 (1997).

⁴⁸ *Gherulal Parakh vs Mahadeodas Maiya and Others* MANU/SC/0024/1959.

suit new conditions of a changing world but the same is true of the principles of common law generally". Here is a sample draft of section of the Special Marriage Act, 1954:

Prenuptial or Marital Agreements. – (1) A man and a women who are intending to get married under this act are eligible to voluntarily enter into a contract by mutual consent which shall be in writing, dated and singed by both intend spouses in the presence of notary and attorneys of both the parties outlining their asset division in case of divorce, separation or death of either of the intended spouses which shall not encourage separation and shall be consistent with section 10 of The Indian Contract Act, 1872.

(2) Each of the intending spouses shall be represented by their attorneys in drafting of any such agreements and if one the spouses voluntarily forgoes their right for legal representation the same shall be notarized and attached with the said agreement or contract.

(3) In drafting of any such agreements the parties, -

- a. Shall fully disclose their financial circumstances including their, assets, liabilities, real estate portions, shared properties, separate properties, life insurances, medical insurances, claims, or any other financial instrument, or information.
- b. Can agree that property acquired during the marriage can be held separately, or jointly, or partially separate, or partially joint and in case of future separation or divorce.
- c. Can agree on division of assets as well as maintenance, or alimony, but the former shall be duly examined by the court which can increase or decrease in the amount of maintenance, or alimony.

(4) Any of such agreements shall not Include, -

- a. A condition with respect to any sexual activities, or periodicity of intercourse, or number of offspring after the solemnization of marriage, or
- b. Any clause with regards to child custody, or any pre-condition which attempts to waive the child support, or responsibility, or
- c. A condition which restricts any person to a residence, or

- d. Any clause which *prima facie* is unfair or inequitable.

In case of any provisions mentioned above included in the said agreement shall be deemed void.

(5) If any of the provisions in any such agreement deemed void under *section 52(4)* of this act, any other provisions shall still hold legal validity in the court of law.

(6) Any property bought before marriage shall be the personal property of the owner in case of divorce. However, if mortgage payments were made by the non-owner, the owner shall reimburse those contributions to the extent that the court deems fit.

(7) If any of the intending spouses leave their income sources voluntarily in future for the purpose of childbearing, or managing household responsibilities the working spouse shall be liable to pay alimony to an extend which the court deems fit. However, this shall only be the case where the both the spouses give it in writing, which shall be notarized.

(8) The court while examining such agreements shall take into consideration the change of circumstances between the time when the agreement was signed and the time of its enforcement.

(9) Any such agreement shall be executed at least 30 days before the solemnization of such marriage under the said act and a copy of such agreement shall be provided to the marriage officer on the day of the solemnization of such marriage which shall be kept with the marriage certificate by the respective marriage officer in the marriage certificate book.

VII. Conclusion: Need for Reforms

The concept of public policy can change and evolve overtime with changing circumstance as mentioned under the Roman law that all laws are established for the benefit of individuals or to serve the welfare of the society. Practices that were ordinary at some point in time in our society such as dowry or child marriage are considered objectionable or illegal today. Similarly, practices that were seen as against public policy shall now be legalized in India.

Public policies and normative values shall never be static in nature and must adapt to changing

circumstances as well as needs of society to ensure inclusivity, equity and justice for all.⁴⁹ It was also held that the rule of law is not merely a tool to regulate public policy, it exists to ensure that individuals lead a proper social life, which allows them to live in dignity and develop themselves.⁵⁰

⁴⁹ Central Inland Water Transport Corporation Limited vs. Brojo Nath Ganguly, (1986) IILJ 171 SC.

⁵⁰ National Legal Services Authority (NALSA) vs. Union of India AIR 2014 SC 1863.